IN THE

Supreme Court of the United States

OCTOBER TERM, 1945.

No. 1360

NEWCOMB CLEVELAND and BANKERS TRUST COMPANY as Executors of the Last Will and Testament of ALFRED W. ERICKSON, Deceased,

Petitioners,

—v.—

JOSEPH T. HIGGINS as Collector of Internal Revenue for the Third District of New York.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

EARL A. DARR,
Counsel for Petitioners,
One Wall Street,
New York City, New York.

ALPERT PRESS, BROOKLYN, N. Y., TEL. TRIANGLE 5-1058-1059

INDEX.

TABLE OF CASES CITED:

(See also Appendix to Petition.)

STATUTES CITED:

REGULATIONS CITED:

TEXTBOOKS CITED:

RULES CITED:

IN THE

Supreme Court of the United States

NEWCOMB CLEVELAND and BANKERS TRUST COMPANY as Executors of the Last Will and Testament of ALFRED W. ERICKSON, Deceased, Petitioners, —against— JOSEPH T. HIGGINS, as Collector of Internal Revenue for the Third District of New York.	October Term, 1945. Number

PETITION FOR WRIT OF CERTIORARI.

MAY IT PLEASE THE COURT:

The Petition of Newcomb Cleveland and Bankers Trust Company as Executors of the Last Will and Testament of Alfred W. Erickson, Deceased, respectfully shows to this Honorable Court:

A.

SUMMARY STATEMENT OF MATTERS INVOLVED.

This Petition presents an application for a Writ of Certiorari to review a *final judgment* of the United States Circuit Court of Appeals for the Second Circuit which reversed a judgment of the United States District Court for the Southern District of New York entered in favor of Petitioners and which dismissed the complaint in this action

and which action is known in the record as Action No. 2 (R. 87, 80, *et seq.*, 2 *et seq.*).

The questions presented by this Petition are substantial and are of *public importance* in connection with the administration of the Federal Estate Tax law because the decision of the Circuit Court will, if not reversed, through a misinterpretation of a Federal Estate Tax Regulation and of the decisions of this Court as to *res adjudicata*, lay down an important and impossible rule to be followed by the Commissioner of Internal Revenue, all Federal estate taxpayers and all attorneys practicing Federal Estate Tax law.

The Circuit Court based its decision herein in part upon what your Petitioners claim to be an erroneous construction of Treasury Regulations 80, Article 34 (1934 Edition) which were Regulations promulgated by the Commissioner of Internal Revenue in connection with the Federal Estate Tax and which Article 34 is currently and word for word in force and now known as Regulations 105, Section 81.34 (See said Regulations copied in full on page 18 of the annexed brief.) Since said Regulations are, except for clerical changes, currently in force the questions here presented are likely to again arise, and issues are hereby presented which transcend the instant case and a decision by this Court is required to settle the applicable law.

The Circuit Court also held that because of Article 34, *and otherwise,* Action No. 1 hereinafter referred to was *res adjudicata* of the issues in this instant Action No. 2 (R. 80 *et seq.*) in contravention of many decisions of this Court. The decision of the Circuit Court adds confusion to the doctrine of *res adjudicata* and this is important to future litigants.

This Petition brings up for consideration the allowance against Federal estate taxes of the decedent Erickson, of certain attorneys' fees claimed by Petitioners and conceded by the Circuit Court to be "administration expenses" of decedent's estate and which fees, if allowed, would have the effect of reducing by $7,668.69, with interest, the estate tax on said estate heretofore paid by your Petitioners. The Circuit Court found that said attorneys' fees were "an admini-

stration expense" of said estate under Section 303 of the Revenue Act of 1926 but held that because of said Regulations 80, Article 34, they were not asserted by Petitioners at the proper time, *i.e.* in said Action No. 1. The Petitioners claim that said attorneys' fees were asserted in due and orderly manner, *i.e.* in this Action No. 2, and that the Circuit Court read into said Regulations that which is not fairly embraced therein and held that there was *res adjudicata* when none exists.

This instant action in which certiorari is asked is known in the record as Action No. 2 (R. 2, *et seq.*). Said attorneys' fees were incurred in connection with an action known in the record as Action No. 1 and which Action No. 1 was (after due claims for refund filed and rejected by the Commissioner of Internal Revenue) brought by Petitioners against Respondent to recover certain Federal estate taxes unlawfully exacted by Respondent from Petitioners (R. 47 *et seq.*). Because of *Maass* v. *Higgins*, 312 U. S. 443, and of said Action No. 1, the Respondent was compelled to refund to Petitioners the sum of $105,823.49, with interest, making a total refund of $122,243.53, and said Action No. 1 was upon the payment of said last mentioned sum to Petitioners dismissed with prejudice upon stipulation of the parties thereto (R. 67). The Respondent did not serve or file any answer to the complaint in said Action No. 1 and no issue was raised in that Action No. 1 as to attorneys' fees incurred in connection with that Action No. 1. Said Action No. 1 was so dismissed in July, 1942 (R. 40). No part of the attorneys' bill in question was rendered to Petitioners until August 1, 1942 (R. 37) and said bill for attorneys' fees was not paid by Petitioners until August 24, 1942 (R. 40). The basis for the reversal of said judgment by the Circuit Court was that said attorneys' fees should, because of said Treasury Regulations 80, Article 34 (1934 Edition), have been asserted in said Action No. 1 through the medium of an amended claim for refund filed prior to the dismissal of said Action No. 1 and that Petitioners' failure to so amend its claim in

said Action No. 1 made said Action No. 1 *res adjudicata* of the issues in this Action No. 2 (R. 80 *et seq.*).

A second claim for refund was duly filed by Petitioners after the dismissal of said Action No. 1 and within the statutory time in which said attorneys' fees were claimed as an "administration expense" of said estate and upon the rejection of said second claim for refund by the Commissioner of Internal Revenue, Petitioners brought this present Action No. 2 against Respondent based upon said second claim for refund, in which present Action No. 2 these attorneys' fees incurred in connection with said Action No. 1 were asserted to be an "administration expense" of said estate, the allowance of which would reduce the total Federal estate tax on said estate to the extent aforesaid (R. 2, 10, 11, 12). The District Court as against a motion made by Respondent to dismiss the complaint in this Action No. 2, held that the complaint stated a cause upon which relief could be granted to Petitioners because said claim for attorneys' fees was a new and different claim which could not have been asserted in said Action No. 1 and would have been premature if attempted to have been asserted in said Action No. 1, and that, therefore, said Action No. 1 was not *res adjudicata* of the issues presented by this Action No. 2 (R. 18). This Action No. 2 was, after the denial of said motion to dismiss, tried upon the pleadings and upon the stipulations of the parties and the District Court on the trial before another Judge, without a jury, followed the Judge who heard the motion to dismiss and entered judgment for Petitioners against Respondent (R. 68 *et seq.*, 30, 37, 38, 41, 45, 47, 58, 64, 67).

Both Judges of the United States District Court wrote very satisfactory opinions and neither of them found that said Regulations 80, Article 34, contained what the Circuit Court holds said Regulations to contain nor did either of them find *res adjudicata* (R. 18, 68).

The Respondent then appealed from this judgment of the District Court and the Circuit Court, while holding and not questioning that said attorneys' fees if properly and timely asserted were "administration expenses" of said estate

(which had the effect of reducing the total Federal estate tax on said estate to the extent above indicated), reversed the judgment further holding that the Petitioners could and should, because of said Treasury Regulations 80, Article 34 (1934 Edition), have asserted in whole or in part by amendment to the first claims for refund upon which said Action No. 1 was based the claim for an allowance of said attorneys' fees in said Action No. 1, and that since this was not done, said Action No. 1 was *res adjudicata* of the issues in this Action No. 2 (R. 77, 80, *et seq.*). This holding of the Circuit Court was reached through what Petitioners claim to be a clear misinterpretation of said Treasury Regulations (which Regulations are set forth in full and discussed at page 18 of the annexed brief) and Petitioners claim that once the Circuit Court had embarked upon a misinterpretation of said Regulations it was an easy road to arrive at an incorrect judgment herein and arrive at its holding that said Action No. 1 was *res adjudicata* of the issues in this Action No. 2.

It is Petitioners' claim that said Regulations 80, Article 34, has no application whatsoever to this case because its only applicable language relates to an estimate of attorneys' fees to be made at the *time of filing* the Federal estate tax return and which return was in this Erickson Estate filed four and one-half years before the attorneys' fees now involved had accrued; that no part of said attorneys' fees had accrued as a claim against Petitioners until August 1, 1942 and that consequently no part thereof became a claim against Petitioners until long after the beginning and after the dismissal of said Action No. 1, and which dismissal took place in July, 1942, because no attorneys' bill had been rendered to Petitioners nor were said attorneys' fees paid by Petitioners until after the dismissal of said Action No. 1; and that since this Action No. 2 is founded upon a new claim totally different from any claim involved in said Action No. 1, that said Action No. 1 could not therefore be *res adjudicata* of the issues in this Action No. 2.

This Court has never had occasion to pass upon the interpretation to be given to the aforesaid Regulations but has

passed adversely to Respondent upon the question of *res adjudicata* under such circumstances and has in many decisions disagreed with the Circuit Court.

B.

REASONS RELIED UPON FOR ALLOWANCE OF THE WRIT.

1. As appears from the above summary statement and the annexed brief, this case presents an important aspect of the administration of the revenue which has not been but which should be decided by this Court. The questions presented by the record herein briefly stated are these:

(a) Must a taxpayer who brings an action for the recovery of an illegally assessed Federal estate tax include therein as an "administration expense" of the estate (by amendment of his claim for refund and then, of necessity by supplemental complaint) the attorneys' fees incurred in connection with the very action which he brings for the recovery of such illegally assessed tax, where no attorneys' fees have accrued at the time of the filing of the claim for refund upon which such action is based or at the time of the bringing of said action or have been billed to or paid by the taxpayer until after the dismissal of such action? or

(b) May a taxpayer, in a case set forth in (a) above and after the dismissal of the first action brought for the recovery of said illegally assessed Federal estate tax, file a second claim for refund claiming said attorneys' fees incurred in connection with said first action as an "administration expense" of the estate which has the effect of reducing the total estate tax payable by the estate and upon the rejection of said last-mentioned claim for refund maintain a second action for the recovery of the excess tax resulting from the disallowance of such claim for attorneys' fees?

The above questions pose a very important point of practice to be followed in connection with Federal Estate Tax procedure. These questions have as hereinafter shown already arisen in Federal Estate Tax practice and will continue to arise in various cases until this Court renders final adjudication thereon because said Treasury Regulations are currently in force and now, except for clerical changes, read word for word as they did when said Actions Nos. 1 and 2 were instituted. If the Circuit Court has laid down an erroneous procedure to be followed in tax cases this is a matter of public importance which affects the revenue, all Federal estate taxpayers and all practitioners of Federal Estate Tax law, and is an appropriate case for the granting of a writ of certiorari because of such importance. (See *B. F. Goodrich Co.* v. *United States*, 321 U. S. 126, to this effect, cited in the "Appendix" to this Petition, where certiorari was granted by this Court because of an alleged erroneous decision by a Circuit Court on a procedural question in a Federal estate tax case. See p. 11 *infra*.) This Court often grants certiorari on the ground that the case is of public importance and/or of importance to the revenue as illustrated by the cases decided by this Court and listed upon the "Appendix" to this Petition. (See p. 11, *infra*.)

2. The Circuit Court of Appeals has decided an important question of Federal law which has not been but which should be settled by this Court, *i.e.*, the interpretation to be given to said Regulations 80, Article 34, which are currently in force, except for clerical changes. Since said Regulations are currently in force the same question as is presented in the instant action is likely to again arise and this case therefore involves far more than its immediate issues. Based upon what Petitioners claim to be an erroneous construction of said Regulations the Circuit Court has held that said Action No. 1 was *res adjudicata* of the issues in this Action No. 2, which latter action claims attorneys' fees incurred in connection with Federal estate taxes in said Action No. 1 as an "administration expense" of said estate, where said attor-

neys' fees had not matured at the time of the commencement of or at the time of the dismissal of said Action No. 1 and which fees could not therefore have been asserted either in whole or in part in said Action No. 1.

3. The Circuit Court of Appeals has decided a Federal question in a way probably in conflict with applicable decisions of this Court, *i.e.*, the Circuit Court has held that said Action No. 1 which involved a claim totally different from the new and different claim asserted in this Action No. 2 was *res adjudicata* of the issues in this Action No. 2 contrary to the decisions of this Court in *Mercoid Corporation* v. *Mid-Continent Investment Company*, 320 U. S. 661; *Larsen* v. *Northland Transportation Co.*, 292 U. S. 20; *Bates* v. *Bodie*, 245 U. S. 520; *United Shoe Machinery Corp.* v. *United States*, 258 U. S. 451; and other cases in this Court; and has decided that the dismissal of said Action No. 1 was *res adjudicata* as to the issues in this Action No. 2 when no matters as to said attorneys' fees were in issue or controverted in said Action No. 1, in contravention of the decisions of this Court in *Mercoid Corporation* v. *Mid Continent Investment Company*, 320 U. S. 661; *Larsen* v. *Northland Transportation Co.*, 292 U. S. 20; and other cases in this Court.

4. The Circuit Court has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision, *i.e.*, the Circuit Court held that it had jurisdiction of that of which it did not have jurisdiction, *i.e.*, it adjudged that said Action No. 1 in which no claim for attorneys' fees was in issue or had matured at the time of the dismissal of said Action No. 1 was *res adjudicata* of the issues of this Action No. 2, and which Action No. 2 is founded upon a new claim totally different from the claim involved in said Action No. 1, in contravention of such cases as *Mercoid Corporation* v. *Mid Continent Investment Company*, 320 U. S. 661, and *Carter-Crume Co.* v. *Peurrung*, 99 Fed. 888, which latter case was cited with approval by this Court in *United States* v. *Worley*,

281 U. S. 339; and *First National Bank of Birmingham* v. *United States*, 25 Fed. Supp. 816; all of which cases stand for the proposition that before a claim can be adjudicated in an action the claim must be in existence and have maturity at the time of the beginning of the action or mature before judgment and be brought in by supplemental complaint, and that a court attempting to adjudge a claim that has no such maturity or not so brought in is without jurisdiction and that there can be no *res adjudicata* of a new and different claim not involved in the first action when asserted in a second action.

5. The United States District Courts have disagreed as to the proper procedure under the circumstances of this case —three District Courts holding for the Petitioners' contentions and one District Court holding somewhat against the Petitioners' contentions—*i.e.*, *First National Bank of Birmingham* v. *U. S.*, 25 Fed. Supp. 816, and the two District Courts in the case at bar, have held that the claim for attorneys' fees asserted in this Action No. 2 could not have been asserted in said Action No. 1 because of prematurity, whereas, a District Court held somewhat per contra in *Smith* v. *U. S.*, 16 Fed. Supp. 397. This Court has sometimes granted certiorari in such cases of disagreement of the lower courts with the Circuit Court, *i.e.*, *Maass* v. *Higgins*, 312 U. S. 443; *City Bank Farmers Trust Co.* v. *Helvering*, 313 U. S. 121. There is a direct conflict on the questions here presented between *First National Bank of Birmingham* v. *U. S.*, 25 Fed. Supp. 816, which arose in the Fifth Circuit, and the Circuit Court of Appeals herein. Since there is a conflict in the practice to be followed in cases such as this, and since this case presents a case of public importance because said Regulations 80, Article 34, are currently in force in Regulations 105, Section 81.34, under which the same question is likely to again arise and because the Circuit Court has misapplied the doctrine of *res adjudicata*, this Court should lend its aid to the certainty of the law.

WHEREFORE, your Petitioners respectfully pray that a writ of certiorari be issued out of and under the seal of this Honorable Court directed to the United States Circuit Court of Appeals for the Second Circuit commanding that Court to certify and to send to this Court for its review and determination on a day certain to be therein named a full and complete transcript of the record and of all the proceedings in the case numbered and entitled on its docket No. 156, October Term 1944, Newcomb Cleveland and Bankers Trust Company as Executors of the Last Will and Testament of Alfred W. Erickson, Deceased, Plaintiff-Appellees, against Joseph T. Higgins as Collector of Internal Revenue for the Third District of New York, Defendant-Appellant, and that said judgment of the United States Circuit Court for the Second Circuit may be reversed by this Honorable Court and that these Petitioners may have such other and further relief in the premises as to this Honorable Court may seem meet and just, and your Petitioners will ever pray.

Dated: New York City, N. Y., June 6th, 1945.

NEWCOMB CLEVELAND and BANKERS TRUST COMPANY as Executors of the Last Will and Testament of Alfred W. Erickson, Deceased.

By EARL A. DARR,
Counsel for Petitioners.

APPENDIX.

Harrison v. *Northern Trust Co.*, 317 U. S. 476, 478;
"We granted certiorari because of the importance of the question in the administration of the federal estate tax system."

Helvering v. *Safe Deposit & Trust Co.*, 316 U. S. 56, 57;
"Because of the importance in the administration of the Federal Estate Tax of the questions involved, we granted certiorari * * *."

Maass v. *Higgins*, 312 U. S. 443, 445;
"Although there was no conflict between decisions of the Circuit Court of Appeals, we granted certiorari because of the importance of the question and the number of pending cases in which it is presented."

Helvering v. *Gooch Milling & Elevator Co.*, 320 U. S. 418;
"We granted certiorari, the problem being one of importance in the administration of the revenue laws."

Claridge Apartments Co. v. *Com'r of Int. Rev.*, 323 U. S. 141;
"Certiorari was granted because of the importance of the questions presented and a conflict on the question of retroactivity."

B. F. Goodrich Co. v. *United States*, 321 U. S. 126;
"Certiorari was granted on a petition which alleged that the Circuit Court's affirmance rested on its erroneous decision of procedural questions."

Dobson v. *Commissioner of Int. Rev.*, 320 U. S. 489;
"Questions important to tax administration were involved, conflict was said to exist, and we granted certiorari."

Oklahoma Tax Comm. v. *United States*, 319 U. S. 598, 599;
"We granted certiorari because of the importance of the cases in the administration of Indian affairs and to the State of Oklahoma."

Interstate Transit Lines v. *Comr. of Int. Rev.*, 319 U. S. 590;
"The writ of certiorari was granted because of uncertainties in this area of important federal tax law."

Helvering v. *Chicago Stock Yards Co.*, 318 U. S. 693, 694;
"We granted certiorari because of the importance of the questions involved."

Helvering v. *Griffiths*, 318 U. S. 371, 372;
"Because of the importance of the question we granted certiorari."

Spies v. *United States*, 317 U. S. 492, 493;
"As the construction of the section raises an important question of federal law not passed on by this Court, we granted certiorari."

Detroit Bank v. *United States*, 317 U. S. 329, 331;
"We granted certiorari because of the importance of the questions presented to the administration of the revenue laws."

Riggs v. *Del Drago*, 317 U. S. 95, 97;
"The importance of the question moved us to grant certiorari."

Allen v. *Regents of Univ. System of Ga.*, 304 U. S. 439;
"Because of their importance we granted certiorari."

Helvering v. *Gerhardt*, 304 U. S. 405, 411;
"We granted certiorari because of the public importance of the question presented."

Helvering v. *National Grocery Co.*, 304 U. S. 282, 286;
"We granted certiorari because of the importance in the administration of the revenue laws of the matter presented."

IN THE

SUPREME COURT OF THE UNITED STATES.

NEWCOMB CLEVELAND and BANKERS TRUST COMPANY as Executors of the Last Will and Testament of ALFRED W. ERICKSON, Deceased, Petitioners, —against— JOSEPH T. HIGGINS, as Collector of Internal Revenue for the Third District of New York.	October Term, 1945. Number

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

THE OPINIONS OF THE COURTS BELOW.

The opinions of the Circuit Court of Appeals is not yet reported, but is dated April 10, 1945 and is found in the record at page 80, *et seq.* One of the opinions of the United States District Court is reported (Judge Leibell), at 50 Fed. Supp. 188. The opinion of Judge Symes of the District Court is not reported but is found at page 68, *et seq.* of the record.

II.

JURISDICTION.

1. The date of the judgment (order for mandate) to be reviewed is April 26, 1945 (R. 87). The three months within which a writ of certiorari may be applied for does not, therefore, expire until about July 26, 1945 and the foregoing Petition will have been filed long before said latter date.

2. The Circuit Court of Appeals based its decision in part upon its construction of Regulations 80, Article 34, of Treasury Regulations, which presents an important question of practice to be followed in Federal estate tax proceedings and has in its holding run counter to the decisions of this Court as to *res adjudicata*.

3. A definite reference to the statutory provision under which jurisdiction of this Court is invoked is Judicial Code Section 240 (U. S. C. Sec. 347) subdivision (a).

4. A reference to the cases believed to sustain the jurisdiction of this Court are those set forth on the Appendix to the Petition to which this Brief is annexed. (*Supra*, p. 11.)

III.

STATEMENT OF THE CASE.

Alfred W. Erickson, a resident of Manhattan, New York City, New York, died on November 2, 1936, and his will was thereafter admitted to probate by the New York County Surrogate (R. 2, 3). Letters Testamentary were issued to Petitioners who are the qualified and acting Executors of said will (R. 3). Petitioners, on February 1, 1938, duly filed the Federal estate tax return on decedent's estate and at the same time exercised the option given to them by Section 302(j) of the Revenue Act of 1926 as amended by Section

404 of the Revenue Act of 1934 and Section 202(a) of the Revenue Act of 1935, to have the value of the estate determined as of a date one year after Mr. Erickson's death (R. 39). The Commissioner of Internal Revenue, acting pursuant to Article 11 of Treasury Regulations 80, which purported to be an interpretation of legislation pertaining to the assessment of Federal estate taxes, thereafter included in the gross of decedent's taxable estate $242,050.93, the income earned by said estate during the year following Mr. Erickson's death (R. 18, 19). The inclusion of this income resulted in an unlawful increase of the total Federal estate tax on said estate and Petitioners paid this unlawful tax (R. 19).

Petitioners, claiming that said year's income was not principal of said estate and therefore not taxable in estate tax proceedings, duly filed on October 24, 1939 with Respondent a claim for refund of the increased tax caused by the inclusion of said year's income in the principal of said estate and on November 24, 1949 filed an amended claim for such refund (R. 53, 58, 51). The Commissioner of Internal Revenue completely rejected both the original and the amended claim for refund (R. 51).

An action known in the record as Action No. 1 was instituted by Petitioners against Respondent to recover the payment of the excess tax caused by the inclusion of said year's income in the principal of said estate (R. 47, 48). This Court decided the case of *Maass* v. *Higgins*, 312 U. S. 443, which held that said Article 11 of Treasury Regulations 80 was beyond the power of the Commissioner to make and there was, therefore, nothing for the Respondent to do but to refund to Petitioners such unlawfully exacted tax. The Respondent thereupon repaid to Petitioners the unlawfully exacted tax, with interest, and said Action No. 1 was, in July, 1942, in pursuance of a stipulation of the parties, dismissed with prejudice (R. 6, 7, 67).

The Petitioners had employed the law firm of Phillips & Avery to file said claims for refund and to bring and conduct

said Action No. 1 and, shortly after the dismissal of said Action No. 1 as aforesaid and on August 1, 1942, said Phillips & Avery rendered to Petitioners a bill for their services in connection with said Action No. 1 in the sum of $18,346.18, and the Petitioners paid said bill on or about August 21, 1942 (R. 7, 37). The Petitioners on or about September 14, 1942 then filed with Respondent a second and further claim for the refund of $7,668.69, with interest, which represented the amount by which said Federal estate tax theretofore paid by Petitioners would be reduced if said $18,346.18 bill was allowed as an "administration expense" of said estate (R. 10, 11, 13). Said second claim for refund so filed on September 14, 1942, was rejected by the Commissioner of Internal Revenue on or about November 16, 1942 (R. 13, 14). Upon the rejection of said last-mentioned claim for refund, the Petitioners began this action (known in the record as Action No. 2) in the United States District Court for the Southern District of New York (R. 2, 9). The Respondent then moved to dismiss said Action No. 2 on the ground that the complaint did not state a claim upon which relief could be granted (R. 17). Such motion for dismissal came on for argument before Judge Leibell of the District Court who rendered an opinion (found at 50 Fed. Supp. 188 and in the record at page 18) in which he held that the complaint in said Action No. 2 *did* state a claim upon which relief could be granted (R. 29). Certain stipulations of facts found in the record at page 30, *et seq.* and page 45, *et seq.* were then entered into by the parties and the case then came on for trial before Judge Symes of the District Court without a jury, and he held that Petitioners proved a claim which warranted judgment in their favor and judgment was accordingly entered for Petitioners (R. 68, 74, 76).

The Respondent then appealed to the United States Circuit Court for the Second Circuit which reversed said judgment of the United States District Court and dismissed the complaint in this Action No. 2 (R. 77, 85). The Circuit Court wrote an opinion in which it first said that Treasury Regulations 80, Article 34, set forth at page 18 *infra* of this

brief, did not apply to this case and then said that such Regulations did provide for the deduction in said Action No. 1 of prospective attorneys' fees under the circumstances of said Action No. 1, and further held that said Action No. 1 was *res adjudicata* of the issues in this Action No. 2 (R. 80, *et seq.*).

IV.

SPECIFICATION OF ERRORS.

1. The Circuit Court of Appeals erred: (a) In finding and deciding that Article 34 of Treasury Regulations 80 (1934 Edition) required the recovery in said Action No. 1 of the excess tax on said estate which would have been brought about by the allowance of said attorneys' fees as an "administration expense" of said estate; and (b) in failing to find and decide that said attorneys' fees could not have been asserted as an "administration expense" of said estate in said Action No. 1; and (c) in finding and deciding that said excess tax on said estate brought about by the allowance of said attorneys' fees as an "administration expense" of said estate could not be recovered in this Action No. 2.

2. The Circuit Court of Appeals erred in finding and deciding that said Action No. 1 was *res adjudicata* of the issues asserted in this Action No. 2.

3. The Circuit Court of Appeals erred in finding and deciding that it had jurisdiction to require that the issues asserted in this Action No. 2 should have been asserted in said Action No. 1.

V.

ARGUMENT.

Summary of Argument.

POINT A. The decision of the Circuit Court has given Article 34 of Treasury Regulations 80 (1934 Edition) an interpretation not warranted by the language or purposes of said Article 34.

POINT B. The dismissal of Action No. 1 with prejudice was not *res adjudicata* of the issues presented in this Action No. 2.

POINT C. The Circuit Court of Appeals was without jurisdiction to require that the issues asserted in this Action No. 2 should have been asserted in said Action No. 1.

POINT A.

THE DECISION OF THE CIRCUIT COURT HAS GIVEN ARTICLE 34 OF TREASURY REGULATIONS 80 (1934 EDITION) AN INTERPRETATION NOT WARRANTED BY THE LANGUAGE AND PURPOSE OF SAID ARTICLE.

Article 34 of Treasury Regulations 80 (1934 Edition) reads as follows:

> "Art. 34. Attorneys' fees.—The executor or administrator, in filing the return, may deduct such an amount as attorneys' fees as has actually been paid or which at that time it is reasonably expected will be paid. If on the final audit of a return the fees claimed have not been awarded by the proper court and paid, the deduction will be allowed, provided the Commissioner is reasonably satisfied that the amount claimed will be paid and that it does not exceed a reasonable

remuneration for the services rendered, taking into account the size and character of the estate and the local law and practice. If the attorney's fees have not been paid at the time of the final audit of the return the Commissioner may disallow such part, or all, of the deduction as the circumstances may warrant, subject to such future adjustment as the facts may require.

"Attorney's fees incident to litigation instituted by the beneficiaries as to their respective interests do not constitute a proper deduction, inasmuch as expenses of this character are properly charges against the beneficiaries personally and are not administration expenses as contemplated by the statute."

(Note: This same Article 34 is now found in current Regulations 105, Sec. 81.34, without change except for clerical corrections which do not change its meaning.)

In examining said Article 34, let us first look to its language and then to its purpose, and then determine whether or not said Article 34 has any application to the state of facts before us or has the application given to it by the Circuit Court.

The language of said Article 34 shows that it is limited to and can only have application to an estimate of attorneys' fees expected to be incurred in administering an estate, said estimate to be made at the time of the filing of the Federal estate tax return, or as expressed in said Article 34, "in filing the return". This is the whole purpose and design and the beginning and the end of said Article 34 and it serves no other purpose. Said Article 34 does not apply to attorneys' fees which an estate incurs long after the filing of the Federal estate tax return (in this case, four and one-half years) and which fees were not in contemplation at the time of the filing of said return as in the instant case. *First National Bank of Birmingham* v. *U. S.*, 25 Fed. Supp. 816.

The Circuit Court first came to this conclusion that said Article 34 had no application other than that which we have just expressed but strayed away from its first conclusion and said:

> "While it does not expressly apply to claims for the refund of taxes paid, it does provide for the deduction of prospective attorneys' fees which executors and administrators will incur and have to pay in administering the estate, in computing the net taxable estate subject to adjustment upon final audit. * * *"

and then found that said Article 34 was applicable to the state of facts involved in said Action No. 1 and in this Action No. 2.

The Federal estate tax return in the instant Erickson Estate was filed February 1, 1938 (R. 39). The attorneys' fees now in question did not mature and had no existence as a claim against Petitioners until a *demand* was made therefor by the attorneys who prosecuted said Action No. 1. No demand for said attorneys' fees was made upon Petitioners until said attorneys rendered their bill on August 1, 1942, after the dismissal of said Action No. 1 in July, 1942 (R. 37, 40). The demand for said attorneys' fees was not made upon Petitioners until four and one-half years after the filing of said Federal estate tax return (R. 39, 37). Under such circumstances, how can it be said that said Article 34, which is limited to an estimate of attorneys' fees at the time of the filing of a return, has any application to the case at bar?

The Circuit Court endeavored to answer this question by saying that it could see no sound reason why a fair estimate of attorneys' fees which Petitioners reasonably expected they would have to pay when they filed their claim for refund for overpaid taxes before the beginning of said Action No. 1 could not have been made in part the basis of their claim for refund even though the attorneys' fees were unascertainable in the correct amount as of that time. We know of no basis in law or practice for any such conclusion as was made by the Circuit Court as the attorneys were under no compulsion to render any bill until they saw fit to do so; the attorneys had the right to withhold their bill until they were sure of success in said Action No. 1 and then base a charge

in part on such success, and, therefore, said attorneys' fees had no maturity until after the beginning and after the dismissal of said Action No. 1. It simply will not do, as suggested by the Circuit Court, to estimate a claim in a court of law. There must be a fixed claim, notwithstanding that the judgment may be for less than claimed but the judgment can not be for more than the claim. *First National Bank of Birmingham* v. *U. S.*, 25 Fed. Supp. 816. Furthermore, the claim must exist at the time of the beginning of the action or it must mature while the action is pending and then be brought in by supplemental complaint. It is not sufficient to bring into the orbit of said Article 34 or the orbit of *res adjudicata* a new and different claim even if it could have been litigated in the first action. Before *res adjudicata* will apply the claim must have been in existence at the time of the beginning of the action.

To have attempted by an amended claim for refund, as suggested by the Circuit Court, to assert said attorneys' fees by estimate in said Action No. 1 would have had the following results:

(a) The Commissioner of Internal Revenue would have asserted, as he successfully did in *First National Bank of Birmingham* v. *U. S.*, 25 Fed. Supp. 816, that said claim for attorneys' fees was premature as being based upon an estimate and that it had no place in said Action No. 1.

(b) Said Action No. 1 would have been thrown into a hodge-podge, into reverse and stalled by an amended claim for refund and could not have gone forward in any particular while any amended claim for refund was pending nor until the Commissioner of Internal Revenue rejected said amended claim for refund or until six months had expired after the filing of such amended claim for refund, because it is a statutory requirement that before an action can be maintained for the recovery of a tax a claim for refund must have been filed and rejected or six months must have elapsed after

its filing and then a recovery in such an action is limited to that and that only which is set forth in the claim for refund. *United States* v. *Felt & Tarrant Mfg. Co.*, 283 U. S. 269. See Internal Revenue Code, Section 3772-(a)-(1) which is to the same effect as Section 1318 upon which 283 U. S. 269 just cited was decided. If in following the Circuit Court's suggestion said attorneys' fees had been estimated they should not have been allowed by the Commissioner of Internal Revenue or by any court because they had not ripened into a claim by the attorneys against the Petitioners at the time of the dismissal of said Action No. 1. The naive suggestion of the Circuit Court that the Commissioner of Internal Revenue might have waived strict compliance as to the filing of an amended claim for refund without a fixation of said attorneys' fees only puts this case into the realm of speculation and does not square with the experience of practitioners before the Bureau of Internal Revenue and to those practitioners would seem to be a frolic with the factual practice which prevails in such Bureau.

(c) Said Action No. 1 could not have gone forward in any particular even if an amended claim for refund had been filed until a supplemental complaint in Action No. 1 had also been filed so as to embrace in said Action No. 1 a claim for a reduction of Federal estate taxes because of said attorneys' fees being an "administration expense", which had the effect of reducing the taxes already paid. *United States* v. *Worley*, 281 U. S. 339.

The very fact that it was, according to the Circuit Court, necessary to file an amended claim for refund would call for a supplemental complaint to show facts that occurred after the beginning of said Action No. 1, because said attorneys' fees were not under the original complaint in said Action No. 1 an issue in said Action No. 1 and in this connection the District Court said:

> "No facts were available at the time of the first claim for refund on which any one could form any reliable estimate of what the attorneys' fees would be

> for services to be rendered in connection with the said claim for refund or with the litigation that might follow if the claim was rejected. The attorney's fees would depend on many elements—the time consumed, the intricate character of the points involved, the extent to which the claim would be litigated through the courts, and the results obtained. No one could even hazard a guess on any one of these elements at that time" (R. 22).

An amended claim for refund in said Action No. 1 would have called for a supplemental complaint before recovery could have been had in said Action No. 1 because said amended claim for refund and attorneys' fees would have consisted of "transactions or occurrences or events which have happened since the date of the pleading sought to be supplemented", *i.e.*, the complaint in said Action No. 1. See Rule 15 of Federal Rules of Practice; and *United States* v. *Worley*, 281 U. S. 339.

Rule 15, subdivision (d), of the Federal Rules of Practice covers supplemental pleadings and provides:

> "(d) *Supplemental Pleadings.* Upon motion of a party the court may, upon reasonable notice and upon such terms as are just, permit him to serve a supplemental pleading setting forth transactions or occurrences or events which have happened since the date of the pleading sought to be supplemented. If the court deems it advisable that the adverse party plead thereto, it shall so order, specifying the time therefor."

It will be observed that said subdivision (d) of said Rules contains nothing more than an option to Petitioners to have included said attorneys' fees in said Action No. 1 even if said attorneys' fees had ripened into a claim against Petitioners before the dismissal of said Action No. 1. There was, under said subdivision (d), no compulsion on Petitioners, as plaintiffs in said Action No. 1, to include said attorneys'

fees in that action under penalty of *res adjudicata*. A plaintiff may, under said subdivision (d), refuse to set up by way of supplemental complaint a claim which accrues after the beginning of an action and have a recovery under his original complaint if the original complaint states a cause of action, and he may proceed to judgment under the original complaint without fear of the new claim which arose after the beginning of the action being adjudged in that action in such manner as to be *res adjudicata* of a new action brought upon the new claim arising after the institution of the first action. If this were not the law the holder of a claim definitely payable in installments would be in peril if he brought an action upon an installment already due and did not file a supplemental complaint so as to allege an installment falling due after the beginning of the action. That a plaintiff need not file a supplemental complaint under these circumstances, was the definite holding of the Court in *Carter-Crume Co.* v. *Peurrung*, 99 Fed. 888; which was cited on this point with approval by this Court in *United States* v. *Worley*, 281 U. S. 339.

The "Restatement of the Law of Judgments" covers this Point A and provides in Section 68, subdivision (2):

> "A judgment on one cause of action is not conclusive in a subsequent action on a different cause of action as to questions of fact not actually litigated and determined in the first action."

And also in Section 68 at page 294 the "Restatement" reads:

> "* * * where the subsequent action is based upon a different cause of action from that upon which the prior action was based, the effect of the judgment is more limited. The judgment is conclusive between the parties in such a case as to questions actually litigated and determined by the judgment; it is not conclusive as to questions which might have been but were not litigated in the original action. This is the doctrine of collateral estoppel."

Again at page 300 of said "Restatement" it is said:

> "A judgment on one cause of action is not conclusive in a subsequent action based upon a different cause of action as to questions of fact which might have been but were not litigated and determined in the prior action."

This Court has in decision after decision consistently applied the rules laid down in such "Restatement". *Mercoid Corporation* v. *Mid-Continent Investment Corporation*, 320 U. S. 661 and cases cited.

As above stated, there was no compulsion on Petitioners, plaintiffs in said Action No. 1, to have served a supplemental complaint in said Action No. 1 and there sought recovery of estate taxes which would have been reduced by the allowance of said attorneys' fees, and Petitioners failure to so assert said attorneys' fees in said Action No. 1 did not make said Action No. 1 *res adjudicata* of the issues in this Action No. 2. Petitioners were at liberty without penalty of *res adjudicata* to reserve the effect of said attorneys' fees on estate taxes for a new action and that is exactly what Petitioners did when they brought this Action No. 2. The holding of the Circuit Court has the effect of prolonging litigation instead of getting it settled and said Court having misconstrued said Article 34 of the Treasury Regulations the judgment of the Circuit Court should be reversed.

POINT B.

THE DISMISSAL OF ACTION NO. 1 WITH PREJUDICE WAS NOT RES ADJUDICATA OF THE ISSUES PRESENTED IN THIS ACTION NO. 2.

Petitioners concede that the dismissal of said Action No. 1 with prejudice was a final judgment on the merits which bars a second action between the same parties for the same cause of action or claim as therein asserted, but Petitioners

strenuously insist that this Action No. 2 does not in any way seek to recover on anything involved in said Action No. 1 and that this Action No. 2 is founded upon a new claim which had no existence at any stage of said Action No. 1. Under such circumstances there is no *res adjudicata*. *Mercoid Corporation* v. *Mid-Continent Investment Company*, 320 U. S. 661 and cases cited. The cases of *U. S.* v. *Parker*, 120 U. S. 89; *Baker* v. *Cummings*, 181 U. S. 117; *Tait* v. *Western Maryland Railroad Co.*, 289 U. S. 620; and *Guettel* v. *U. S.*, 95 F. (2d) 229, certiorari denied 305 U. S. 603; relied upon by the Circuit Court herein stand for nothing more than that which we have above conceded.

We shall discuss in detail the *Guettel* case, because that is the case upon which the Commissioner of Internal Revenue wholly relied in rejecting Petitioners' second claim for refund upon which this Action No. 2 is founded and upon which the Circuit Court largely relied for the conclusion that the issues in said Action No. 1 were *res adjudicata* of the issues in this Action No. 2 (R. 12, 14, 80, *et seq.*). Petitioners claim that the *Guettel* case differs just one hundred percent from the case at bar and the basis of this claim of difference is as follows:

In the *Guettel* case there had been included in the gross estate for Federal estate tax purposes the proceeds of certain life insurance policies and certain Missouri real estate. A claim for refund was filed for so much of the estate tax as was attributable to the inclusion of the value of the insurance policies in the gross estate. This claim for refund based on the insurance was rejected and suit was then brought to recover the alleged over-payment resulting from the inclusion of the value of the insurance policies in the gross estate and the executors recovered upon this insurance claim. Later, the executors filed a second claim for refund of so much of the Federal estate tax as was attributable to the mistaken inclusion of the Missouri real estate in the gross estate. This claim based upon the real estate was also rejected. The executors then sued in a second action on the

last rejected claim which involved the real estate. The Government pleaded the judgment in the first action as a bar to the second action. From the foregoing statement it is plain that the executors in the *Guettel* case had in the beginning two fully matured claims both arising out of the same subject matter—one on the insurance and one on the real estate—prior to the beginning of the first action, and the Court held that the first action was *res adjudicata* of the issues in the second action on the theory that a judgment on the merits is conclusive upon "all matters which might have been decided" in the first action. It is plain that in the *Guettel* case both the insurance claim and the real estate claim could have been litigated in the first action, *i.e.*, they were one and the same claim and not a new or different claim or as expressed by the Court in that case:

> "* * * the cause of action for the recovery of the whole excess arose out of one transaction and was a single cause of action, regardless of the number of grounds upon which the tax was excessive."

In the case at bar no cause of action embracing said attorneys' fees existed until after the dismissal of said Action No. 1. The existence of the Petitioners' cause of action in this Action No. 2 was wholly dependent upon their second claim for refund, because Petitioners had two causes of action and not one cause of action as in the *Guettel* case. The Petitioners in the case at bar were not splitting up their claim for the recovery of the overpayment of Federal estate tax payments nor were they proceeding piece-meal, nor did they present in said Action No. 1 only a portion of their claim, nor were they leaving another ground to be presented in a subsequent action. Said Action No. 1 as it stood at the time of the dismissal thereof presented every issue that could have been litigated therein because the Petitioners at the time of said dismissal owed no attorneys' fees and these fees only came into existence as a claim against Petitioners subsequent to the dismissal of said Action No. 1, *i.e.*, said Action No. 1 was

dismissed in July, 1942, and the bill for said attorneys' fees was not rendered—demanded—of Petitioners until August 1, 1942. We have already seen that there can be no recovery of attorneys' fees until a demand is made therefor.

In the case at bar there was no matured claim for attorneys' fees either at the time of the beginning of or at the time of the dismissal of said Action No. 1 and no factual basis existed upon which to claim said attorneys' fees in whole or in part in said Action No. 1 and any such claim would have been premature if made at any stage of said Action No. 1. *First National Bank of Birmingham* v. *U. S.*, 25 Fed. Supp. 816. The Circuit Court misapprehended the distinctions existing between the *Guettel* case and the case at bar and quoted language from the *Guettel* case which has no application here. Therefore, it appears that the *Guettel* case has no application whatsoever to the case at bar nor does *Tucker* v. *Alexander*, 275 U. S. 228, cited by the Circuit Court have any such application.

This case on the phase of *res adjudicata* comes right down to this clean-cut issue, *i.e.*, is it governed by those cases in this Court which held that:

> "The case * * * is governed by the principal that where the second cause of action (this Action No. 2) between the parties is upon a different claim the prior judgment is res judicata not as to issues which might have been tendered but 'only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered'?" (*Mercoid Corporation* v. *Mid-Continent Investment Company*, 320 U. S. 661, p. 671.)

or is it governed by those cases in this Court which hold that a judgment if rendered upon the merits is conclusive not only as to all matters which were decided but as to all matters which might have been decided such as *U. S.* v. *Parker*, 120 U. S. 89; *Northern Pacific R. Co.* v. *Slaght*, 205 U. S. 122.

It is Petitioners' claim that cases such as the *Mercoid* case govern the instant case because this Action No. 2 is based upon a new claim entirely different from any claim involved in said Action No. 1. There was no claim for said attorneys' fees extant at the time of the beginning or at the time of the dismissal of said Action No. 1 and whatever was decided by its dismissal with prejudice was an adjudication "only as to those matters in issue or points contraverted" and a reference to the complaint in Action No. 1 which was the only pleading in that action (the defendant not having answered) will show that the scope of whatever was adjudicated in that Action No. 1 could not have embraced anything in reference to said attorneys' fees because said fees were not and could not have been an issue in said Action No. 1, and that "the finding or verdict rendered" by such dismissal in said Action No. 1 covered only the issues there involved.

This Court has held that in such a case the pleadings are to be examined in order to determine what was decided by the findings or verdict rendered *i.e.*, the dismissal of said Action No. 1 with prejudice. *Bates* v. *Bodie*, 245 U. S. 520. The complaint in Action No. 1, which was the only pleading extant when said Action No. 1 was dismissed, will be searched in vain for any issue which would involve said attorneys' fees (R., 47, 48, *et seq*). The Circuit Court failed to mention in its opinion the case of *First National Bank of Birmingham* v. *U. S.*, 25 Fed. Supp. 816, where the plaintiff did exactly what the Circuit Court says the Petitioners herein should have done in said Action No. 1, *i.e.*, assert by way of amended claim for refund said attorneys' fees, but the plaintiff in that case was at the request of the Commissioner of Internal Revenue defeated, because the Court said:

> "Should the amount of the attorney's fees for the prosecution of this litigation for refund, which amount is still in an undetermined sum, be deducted from the gross estate as an expense of the estate, for the purposes of determining the Federal Estate Tax? * * *

> The plaintiff's claim for deduction from the gross estate for the purposes of computing the Federal Estate Tax of the, as yet undetermined, amount of the attorneys' fees for this litigation in my opinion must be denied. * * * the claim is for an indefinite amount and for a prospective expense not yet accrued or determined, I hold that the claim for refund which was filed by Mr. Kaul's executors was insufficient to allow that part of this suit which makes claim for reduction of the estate by the amount of attorney's fees. My conclusion is based on the insufficiency and prematurity of the claim for refund and the claim itself. * * *"

There is nothing in the Circuit Court's suggestion that so much of said attorneys' fees as were earned up to the time the first claim for refund was filed is barred because an attorney is at liberty to await the conclusion of a litigation before he bills his client and he need not bill a client piecemeal. The fact that the attorneys awaited the conclusion of the litigation in said Action No. 1 and did not bill Petitioners until such conclusion does not bar this Action No. 2. Nor is there anything in the Circuit Court's suggestion that the estate tax was assessed and paid as a single tax. Such is obviously not the case with which we are now dealing. The Circuit Court simply borrowed this expression as to "a single tax" from *Guettel* v. *U. S.*, but the expression has no place in the instant case because we have shown the facts herein involved to be totally different from the facts involved in the *Guettel* case.

The Circuit Court also laid stress upon the fact that successive suits may be brought under the circumstances of this case and that the attorneys' fees in each case constitute an "administration expense" of the estate which has the effect of further reducing the tax. A complete answer to this observation by the Circuit Court is that the whole train of circumstances stems from the fact that the Commissioner of Internal Revenue originally unlawfully seized the Petitioners

property and if successive suits are necessary under such circumstances then the Commissioner should be the last one to complain.

There was therefore, no *res adjudicata* of the issues in this Action No. 2 by said Action No. 1 and the judgment of the Circuit Court should be reversed.

POINT C.

THE CIRCUIT COURT WAS WITHOUT JURISDICTION TO REQUIRE THAT THE ISSUES ASSERTED IN THIS ACTION NO. 2 SHOULD HAVE BEEN ASSERTED IN SAID ACTION NO. 1.

It is elementary that no court can come to a valid judgment unless it has jurisdiction over the claim in question. Thus it has been held by this Court that if a second installment of a claim becomes due after the institution of an action upon a first installment there can be no recovery on the second installment until and unless a supplemental complaint has been filed in which supplemental complaint said second installment is pleaded. If the Court undertakes to render judgment on the second installment without a supplemental complaint having been filed the Court is without jurisdiction and its judgment as to the second installment is void. This Court in *United States* v. *Worley*, 281 U. S. 339, involving this point, said:

> "But the certificate does not disclose any supplemental petition in respect of such installments, and the judgment should not include them. *Hamlin* v. *Race*, 78 Ill. 422; *Carter-Crume Co.* v. *Peurrung*, 40 C. C. A. 150, 99 Fed. 890."

In the *Carter-Crume* case just cited the holding was that a plaintiff was not bound to file a supplemental complaint for an installment coming due after the institution of a suit and that the installment coming due after the institution of

the first suit was a proper subject of a second action. The Court in the *Carter-Crume* suit, said:

> "It may be that, upon leave of court, the plaintiff, by supplemental petition, might have included in the former suit all the installments which had fallen due after the filing of the original petition, but he was under no obligation to do so."

It was held in the *Carter-Crume* case that there was no *res adjudicata* by the failure of plaintiff to supplement his complaint. Attention is called to the fact that Judges Taft, Lurton and Day constituted the Circuit Court which decided the *Carter-Crume* case and that this Court has cited the *Carter-Crume* case with approval in *United States* v. *Worley,* 281 U. S. 339. Even if Petitioners had had the option to include said attorneys' fees in said Action No. 1 (which option they did not have):

> "A judgment is not conclusive of those matters as to which a party had the option to but did not in fact put in litigation in the action. Freeman, Judgm. 5th ed. Section. 786."

Larsen v. *Northland Transportation Company,* 292 U. S. 20, page 25 and cases cited.

The attorneys' fees asserted in this Action No. 2 were not a matured claim against Petitioners at the time of the beginning of or at the time of the dismissal of said Action No. 1 and no supplemental complaint having been filed in that Action No. 1 which pleaded said attorneys' fees as an "administration expense" effective to reduce the Federal estate taxes on said estate and the Petitioners not having been bound to file such supplemental complaint on an unmatured claim and being privileged to bring this Action No. 2 wherein said attorneys' fees are asserted for the purpose of reducing said Federal estate taxes, the Circuit Court was utterly with-

out jurisdiction to find or hold that said claim for attorneys' fees could or should have been asserted in said Action No. 1.

The Circuit Court has, therefore, so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision. The judgment of the Circuit Court should, therefore, be reversed.

CONCLUSIONS.

It is, therefore, because of the manifest errors of the Circuit Court, respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers in order that a question of public importance be reviewed and settled and that to such an end a writ of certiorari should be granted and this Court should review the decision of the Circuit Court of Appeals for the Second Circuit and finally reverse it.

Dated: New York City, N. Y., June 6th, 1945.

EARL A. DARR,
Counsel for Petitioners.

INDEX

CITATIONS

654028—45

In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 119

NEWCOMB CLEVELAND AND BANKERS TRUST COMPANY, AS EXECUTORS OF THE LAST WILL AND TESTAMENT OF ALFRED W. ERICKSON, DECEASED, PETITIONERS

v.

JOSEPH T. HIGGINS, COLLECTOR OF INTERNAL REVENUE FOR THE THIRD DISTRICT OF NEW YORK

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the Circuit Court of Appeals (R. 80–84) is reported at 148 F. 2d 722. The first opinion of the District Court (R. 18–28) is reported at 50 F. Supp. 188. The second opinion of the District Court (R. 68–73) is not reported.

JURISDICTION

The judgment of the Circuit Court of Appeals (R. 85) was entered on April 26, 1945. The peti-

tion for a writ of certiorari was filed on June 8, 1945. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether the court below erred in holding that the petitioners are precluded from maintaining this action for recovery of an amount paid as federal estate tax by reason of the fact that petitioners brought an earlier action, based on an earlier refund claim and on a different ground, for refund of a part of the total estate tax paid, which action, after administrative settlement of the estate tax liability, was dismissed with prejudice upon agreement of the parties.

STATUTE AND REGULATIONS INVOLVED

Revenue Act of 1926, c. 27, 44 Stat. 9:

> SEC. 303 [as amended by Section 805 of the Revenue Act of 1932, c. 209, 47 Stat. 169]. For the purpose of the tax the value of the net estate shall be determined—
>
> (a) In the case of a resident, by deducting from the value of the gross estate—
>
> (1) Such amounts—
>
> * * * * *
>
> (B) for administration expenses,
>
> * * * * *
>
> as are allowed by the laws of the jurisdiction, whether within or without the United States, under which the estate is being administered, * * *.

Treasury Regulations 80 (1934 Ed.):

> ART. 34. ATTORNEY'S FEES.—The executor or administrator, in filing the return, may deduct such an amount as attorney's fees as has actually been paid or which at that time it is reasonably expected will be paid. If on the final audit of a return the fees claimed have not been awarded by the proper court and paid, the deduction will be allowed, provided the Commissioner is reasonably satisfied that the amount claimed will be paid and that it does not exceed a reasonable remuneration for the services rendered, taking into account the size and character of the estate and the local law and practice. If the attorney's fees have not been paid at the time of the final audit of the return the Commissioner may disallow such part, or all, of the deduction as the circumstances may warrant, subject to such future adjustment as the facts may require.
>
> Attorney's fees incident to litigation instituted by the beneficiaries as to their respective interests do not constitute a proper deduction, inasmuch as expenses of this character are properly charges against the beneficiaries personally and are not administration expenses as contemplated by the statute.

STATEMENT

Petitioners are the duly qualified and acting executors of the last will and testament of Alfred W. Erickson, deceased, who died testate, a

resident of the State of New York, on November 2, 1936 (R. 30). As such, they duly filed with the respondent, Collector of Internal Revenue for the Third District of New York, a federal estate tax return for the estate of Alfred W. Erickson, deceased. Acting upon advice of counsel, in filing such return, they exercised the option granted by Section 302 (j) of the Revenue Act of 1926, as amended by Section 404 of the Revenue Act of 1934, and Section 202 (a) of the Revenue Act of 1935, to have the value of all of the property in the estate at the date of death determined for purposes of the tax as of one year after the date of death. (R. 31, 38–39, 41–42.) Also acting on advice of counsel, petitioners failed to include in the gross estate the amount of $242,050.93, representing income of the estate for the period from the date of death to the valuation date as required by Article 11 of Treasury Regulations 80 (1937 Ed.). (R. 31, 38–39, 41–42.)

Upon audit of the decedent's estate tax return, the Commissioner, pursuant to Article 11 of Treasury Regulations 80 (1937 Ed.), included in the gross estate the sum of $242,050.93, representing property which this Court later held in *Maass v. Higgins,* 312 U. S. 443, was not properly includible in the gross estate. As a result, the Commissioner collected a large additional estate tax, plus interest, which included a total of $111,244.40 additional tax and interest resulting from the

erroneous inclusion of this $242,050.93 in the gross estate. (R. 32–34.)

The total estate tax liability as determined by the Commissioner was $1,489,824.71. Petitioners paid the sum of $1,356,653.98 on account of such tax on or about February 1, 1938, and on or about September 29, 1939, they paid the balance of $133,170.73, together with interest amounting to $13,250.48. (R. 32.)

On or about October 24, 1939, petitioners filed a claim for refund of $101,177.27 estate tax and interest (R. 33, 53–58), and on or about November 24, 1939, they filed an amended claim for the same amount (R. 33, 58–63). Both the original and the amended claims were based on the ground that the Commissioner had erroneously included the above $242,050.93 of income of the estate for the year following decedent's death. The amended claim added an alternative demand (R. 63, paragraph (7)), for refund of $51,129.39 on the ground that if the above income of $242,050.93 was properly includible in the gross estate, the value of the gross estate should be reduced by $122,319.12 paid as federal income tax and New York State income tax on the income in question. No other ground for refund was advanced in these claims.

The above refund claims were rejected by the Commissioner on January 29, 1940 (R. 34, 64–66), and on January 19, 1942, petitioners brought an action in the District Court for the Southern Dis-

trict of New York against the respondent, based upon the above claims for refund, to recover the sum of $111,244.40 additional estate tax and interest, together with interest thereon from date of payment (R. 34, 39, 47–52). In the meantime, this Court had decided *Maass* v. *Higgins, supra,* on March 3, 1941. Although administrative settlement was under consideration, this suit was brought for the reason that the statute of limitations was about to toll on petitioners' claim (R. 46).

Following the filing of the above suit on January 19, 1942, certain further negotiations were conducted by counsel for the petitioners with the Commissioner; these culminated in a stipulation for refund of $122,243.53, including interest, and for dismissal of petitioners' complaint. The refund was made to petitioners on or about July 14, 1942, and the complaint in the District Court was dismissed with prejudice. (R. 34, 38–40, 46.)

Following the conclusion of the above litigation, petitioners' attorneys, under date of August 1, 1942, submitted their bill for $18,346.18 for disbursements and services rendered in connection with decedent's estate tax matters. This bill was paid on or about August 21, 1942. (R. 34, 37.)

The record shows that petitioners' attorneys (Phillips & Avery) first began preliminary work on estate tax problems in connection with decedent's estate on December 10, 1936, shortly after his death (R. 38). There is nothing to

show that any compensation had been paid to them prior to the payment of $18,346.18 on August 21, 1942. The contrary is apparent from the contents of their bill for services (R. 37), and it appears from the affidavit of one of the attorneys (R. 38–40) and the affidavit of a trust officer of Bankers Trust Company (R. 41–45) that the greater part of such services had been performed prior to the filing of the complaint on January 19, 1942.

On or about September 14, 1942, shortly after payment of the $18,346.18 for attorney fees on August 21, 1942, petitioners filed a new claim for refund of $7,668.69 on the ground that the attorney fees and expenses of $18,346.18 should be allowed as a deduction from the gross estate as an administration expense under Section 303 (a) of the Revenue Act of 1926, as amended (R. 10–12, 34). The Commissoner rejected this claim on the ground that the question of decedent's estate tax liability was *res judicata* by reason of the final judgment entered in the first suit (R. 13–14, 35). Thereupon, petitioners brought the present action in the District Court for the Southern District of New York, based upon the refund claim filed on September 14, 1942, to recover the sum of $7,668.69, with interest (R. 2–9). The Collector moved to dismiss the complaint on the ground that it failed to state a claim upon which relief could be granted (R. 17). The motion to dismiss

was denied by the District Court on May 20, 1943 (R. 29), pursuant to an opinion by the court (R. 18–28) in which it was held that the question presented by the complaint was not *res judicata*. An answer was filed (R. 15–16), and, on the basis of stipulated facts (R. 30–67), the District Court, after delivering an opinion (R. 68–73), gave judgment for petitioners as prayed (R. 76). The Circuit Court of Appeals reversed the judgment of the District Court and ordered the complaint dismissed (R. 85).

ARGUMENT

The judgment of dismissal with prejudice entered by the District Court in the first suit brought by these petitioners was as conclusive as if it had been entered on the merits after trial. The substance of petitioners' argument in this case is that the prior judgment cannot preclude recovery in this case because the present action is based upon a new claim "which had no existence at any stage of said Action No. 1." (Br. 26.) The record shows, however, that this description of the factual basis for recovery is not an accurate one. The court below properly held that the deduction could and should have been taken into consideration in the final determination of the estate tax liability before the first suit was settled.

It is first urged (Br. 18–25) that the decision below interprets Article 34 of Treasury Regulations 80 (1934 Ed.) in a manner not warranted

by its language or its purpose. The argument is fortified by the assertion that (Br. 27)—

> the Petitioners at the time of said dismissal owed no attorneys' fees and these fees only came into existence as a claim against Petitioners subsequent to the dismissal of said Action No. 1, * * *.

But the court below did not misinterpret the Regulations and the record does not justify the statement that no attorney fees were owed at the time the first action was dismissed.

The first part of Article 34 of Treasury Regulations 80 (1934 Ed.) deals with the deduction of attorney fees at the time of filing the estate tax return, and the court below said that the Regulations do not, in terms, apply to the present situation because they do not expressly apply to claims for refund (R. 83). However, the court correctly pointed out that the Regulations do provide for deduction of prospective attorney fees which the executors will incur and have to pay in administering the estate. Furthermore, the Regulations specifically provide for allowance or disallowance by the Commissioner, "subject to such future adjustment as the facts may require." Both the language and the spirit of the Regulations contemplate the deduction of a reasonable allowance for attorney fees—even if not yet allowed and paid—in the final determination of estate tax liability.

The record shows that the attorneys began per-

forming services in connection with the estate tax matters in December 1936, about two months after decedent's death (R. 38–39). Such services presumably were completed in 1942 when the Government agreed to refund the amount of taxes involved in the first suit. The record does not show what compensation arrangement had been agreed upon by the parties, or whether the $18,346.18, paid in August 1942, was compensation for all services rendered in connection with the decedent's estate tax matters. But the record certainly warrants an inference that this payment represented compensation for all services rendered, and also that most of such services were rendered prior to the filing of the first suit in January 1942. That the attorneys expected, and were entitled to, reasonable compensation for their services must also be assumed even if petitioners did fail to prove the nature of their compensation arrangement.

Finally, the court below properly held that petitioners could and should have claimed the benefit of the deduction here involved, at least by way of estimate, in their first suit. They were under no compulsion to dismiss their first action with prejudice unless they were satisfied with the administrative determination of decedent's estate tax liability. The petitioners made no attempt to raise the question of attorney fees prior to the dismissal of the prior action or to reach any agreement with the Commissioner as to the allowance of the fees.

Moreover, if it should be assumed, contrary to what is the clear import of the Regulations, that the Commissioner would not at any time have allowed a deduction for attorney fees without a claim raising the issue, it should be noted that the *Maass* case was decided in March 1941, and a new, timely, claim could have been filed in time to raise the issue of attorney fees in the prior case. If the fees depended on the amount of recovery, an accurate approximation of the amount due could have been readily made, since administrative settlement was contemplated shortly and the suit was filed only to toll the statute of limitations. The decision in *First Nat. Bank of Birmingham* v. *United States,* 25 F. Supp. 816 (N. D. Ala.) is distinguishable. The decision in that case appears to be based upon the ground that the refund claim was itself inadequate because no amount was specified. Compare *Smith* v. *United States,* 16 F. Supp. 397 (D. Mass.), affirmed without consideration of this point *sub. nom. United States* v. *Nichols,* 92 F. 2d 704 (C. C. A. 1st).

Although the decision below may result in denying a deduction to this estate to which it might be entitled, that is due to the fact that petitioners misconceived their remedy.[1] It must be borne in

[1] Insofar as the issue here involved can be generalized, it has been fairly resolved to allow recovery based on deductions for attorneys' fees even before the amount of the fee is definitely ascertained. See 3 P-H Tax Service (1945) pars. 23,981-23,990. There is no warrant for judicial interference with this generally satisfactory procedure.

mind that the estate tax liability is to be determined as a unit, regardless of the number of issues respecting that liability which might arise. Cf. *Guettel* v. *United States,* 95 F. 2d 229 (C. C. A. 8th), certiorari denied, 305 U. S. 603. If petitioners were right, litigation could be carried on indefinitely were it not for the statute of limitations. Upon termination of the present litigation a new claim for refund could be filed, and a new suit brought, based upon the deductibility of attorney fees paid in connection with this case. The process could be repeated indefinitely. We submit that no such result ever was intended and that the Commissioner's Regulations adequately provide for the situation.

What has been said sufficiently shows that the decision below is not in conflict with any of the decisions relied upon by petitioners (Pet. 8–9) because of the unique factual situation here involved.

CONCLUSION

The decision below is correct and there is no conflict of decisions. Furthermore, because of the peculiar facts of this case, the question involved is not of sufficient general importance to justify review by this Court. The petition for a writ of certiorari should, therefore, be denied.

Respectfully submitted.

HUGH B. COX,
Acting Solicitor General.
SAMUEL O. CLARK, JR.,
Assistant Attorney General.
SEWALL KEY,
HELEN R. CARLOSS,
FRED E. YOUNGMAN,
Special Assistants to the Attorney General.

JULY 1945.

U. S. GOVERNMENT PRINTING OFFICE: 1945